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NO. 90-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CAPTAIN J. P. TRISTANI, et al,

Petitioners,

v.

EASTERN AIR LINES, INC., et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should even entertain this petition given the fact that there is no final decision in this action.
2. Whether the United States Court of Appeals for the Eleventh Circuit erred in vacating the District Court's final judgment and all orders entered in the case subsequent to the filing of the Complaint and directing the District Court to transfer the case to the United States District Court for the Southern District of New York.

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Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari seeking review of the *per curiam* decision of the Eleventh Circuit Court of Appeals entered November 20, 1990. In that decision, the Eleventh Circuit concluded that all issues in this case are presently being litigated in the United States District Court for the Southern District of New York in a Chapter 11 bankruptcy proceeding involving Eastern Air Lines. Accordingly, the Eleventh Circuit ordered the case transferred to the Southern District of New York pursuant to 28 U.S.C. § 1404(a). That transfer has subsequently taken place and accordingly, all issues for which certiorari is now petitioned are presently pending before the District Court in the Southern District of New York.

The lengthy history that brought the Petitioners to this Court will be briefly outlined below. In summary, on March 29, 1990 the New York Bankruptcy court in which Eastern's reorganization proceedings were pending issued a

permanent injunction against these Petitioners and their attorney Moreton Rolleston from continuing to prosecute this action in the federal district court in Atlanta (The Georgia action). Petitioners appealed that permanent injunction to the United States District Court for the Southern District of New York but sought no stay of its enforcement. Instead, Petitioners blatantly disregarded the permanent injunction and continued to prosecute the Georgia action for which they were subsequently sanctioned by the New York court. The Georgia district court subsequently dismissed this case and Petitioners appealed to the Eleventh Circuit. The Eleventh Circuit, instead of affirming that dismissal, transferred the case to New York for the reasons identified above.

Respondents respectfully submit that Petitioners and their attorney have engaged in a consistent course of conduct in which they have wasted the time of the district court in Georgia, the time of the Eleventh Circuit Court of Appeals and respectfully, are now doing the same to this court. Petitioners and their attorney have ignored the terms of a prior permanent injunction, have been undaunted even in the face of judicial sanctions and have continued in that conduct with respect to the present petition for certiorari.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Georgia on February 12, 1990 by attorney Rolleston. On March 5, 1990, Rolleston was informed that Eastern Airlines, Inc. ("Eastern") would file an adversary proceeding the following day in the New York bankruptcy court and would request a temporary restraining order prohibiting Petitioners from continuing with the Georgia action and requiring them to dismiss the Georgia action as violative of the automatic stay provisions of the Bankruptcy Code. 11 U.S.C. § 362. Petitioners refused to attend the hearing on the motion for a temporary restraining order or even to participate by telephone. The motion was granted on March 6, 1990. Petitioners were then ordered to show cause on March 14, 1990 why a preliminary injunction should not

issue. Copies of the Temporary Restraining Order and Show Cause Order were sent to Rolleston by overnight mail that same day.

On March 9, 1990, Rolleston wrote to the bankruptcy court stating that he had not received the Temporary Restraining Order and Show Cause Order until March 9 and therefore would not be able to respond to them as required by the court. Rolleston did not ask for an extension to prepare for the preliminary injunction hearing or for an adjournment of that hearing, which was held on March 14, 1990. Rolleston had notice of the preliminary injunction hearing but did not appear or file any pleadings prior to the issuance of the preliminary injunction. Eastern presented witnesses and a full evidentiary presentation in support of its request. Following the hearing, the bankruptcy court issued an Order and Memorandum Decision preliminarily enjoining Petitioners from pursuing the Georgia action.

At the March 14 hearing, the bankruptcy court declined to consolidate the hearing on the motion for preliminary injunction with the hearing on the permanent injunction. Instead, it scheduled a hearing for March 23, 1990 on the request for a permanent injunction, providing Rolleston with more time to appear and present a defense. Rolleston was given ample notice of the pending hearing: by hand-delivered letter on March 15, 1990; by telephone on March 22, 1990; and by another hand-delivered letter on March 22, 1990. Rolleston did not respond to the request for a permanent injunction or in any way contact the bankruptcy court in an attempt to protect his own rights or the rights of his clients. On March 29, 1990 the bankruptcy court permanently enjoined Petitioners and attorney Rolleston from continuing the prosecution of the Georgia action. Petitioners and attorney Rolleston were further ordered to discontinue the Georgia action.

Petitioners filed a Notice of Appeal from the permanent injunction on March 28, 1990 but did not seek to stay the injunction pending appeal. Instead, Petitioners filed a motion to dismiss the adversary proceeding in the bankruptcy court.

The grounds for this motion were that venue was improper in the New York court, that the bankruptcy court's permanent injunction was void because Petitioners did not receive notice of all of the hearings in the bankruptcy court and that the bankruptcy court improperly heard the merits of the permanent injunction action before their time for filing pleadings had run.

In a Memorandum Endorsement filed on April 24, 1990, the bankruptcy court denied the motion to dismiss, finding that the filing of the appeal divested the court of jurisdiction to determine the motion and the issue of venue. The court further found that the Petitioners waived any objections to venue by not raising that defense previously and that Petitioners had adequate notice of and opportunity to respond to all court proceedings and decisions.

The Petitioners ignored the permanent injunction and continued with the Georgia action. In fact, Petitioners went so far as to file a motion for partial summary judgment and a motion for default judgment in the Georgia action. They also filed a motion to preliminarily enjoin the enforcement of the automatic stay, which was denied by Order of the Georgia district court dated August 31, 1990, and a motion to stay the hearing on Eastern's claim for damages pursuant to 11 U.S.C. § 362(h) in the bankruptcy court, which was denied as moot by the Georgia court on September 27, 1990.

By Order dated August 31, 1990 and amended on September 27, 1990, the Georgia court dismissed with prejudice the action brought by Petitioners in Georgia, finding that all of the decisions by the New York court were *res judicata* on the case pending in the Georgia court and that the New York court's order requiring dismissal of the Georgia action should and must be enforced. An expedited appeal followed and, on November 20, 1990, the United States Court of Appeals for the Eleventh Circuit issued a *per curiam* decision which vacated the district court's final judgment and all orders entered in the case after the filing of the complaint and directed the district court to transfer the entire case to the

United States District Court for the Southern District of New York. That transfer has now been accomplished.

SUMMARY OF THE ARGUMENT

The claims raised by the Petitioners in the Georgia action are still pending in the New York court. Those issues that were raised in the Georgia action that have already been decided in the New York bankruptcy action are now being decided on appeal in the United States District Court for the Southern District of New York. The only decision made by the United States Court of Appeals for the Eleventh Circuit was to transfer this entire action to New York. Therefore, there is no final decision from which Petitioners are appealing and this Court should deny this Petition for Certiorari.

Furthermore, the Eleventh Circuit was fully justified in transferring this action to the New York court. The same or similar issues have already been decided or are now being litigated in that action. All of the parties are subject to the jurisdiction of that court in accordance with the Bankruptcy Code. The appropriate forum for hearing all of the issues raised by Petitioners is the Bankruptcy court because, pursuant to the Bankruptcy Code, claims against a bankrupt party must be filed in the bankruptcy action. Consolidating all of Petitioners' claims in one forum would be the most efficient and effective use of judicial and economic resources.

REASONS FOR DENYING THE PETITION

The only action taken by the Eleventh Circuit was to transfer this case to the New York court. This case has not been fully and finally decided, nor have any of the issues raised by Petitioners been determined by the Georgia courts. The only issue before this Court is whether the transfer of this action was proper. Federal case law is consistent in holding that an order transferring an action to a different federal court is not final for purposes of appellate review and therefore cannot be the basis for an appeal. *See United States Fire Ins. Co. v. American Fidelity Life Assur. Co.*, 787 F.2d 438 (8th

Cir. 1986); *Howard Electrical & Mechanical Co. v. Frank Briscoe Co.*, 754 F.2d 847 (9th Cir. 1985); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982). Petitioners may challenge the transfer after a full and final determination of their claims. Therefore, there is no final order for this court to review and the granting of certiorari would be inappropriate.

In their petition for certiorari, Petitioners completely ignore the real issue in this case. Instead of addressing whether this action should have been transferred to the New York District Court, Petitioners argue only that this Court should hear this case because there is a divergence of opinion in various circuits as to whether a bankruptcy court can conduct a jury trial. Extrapolating from the two pages in which Petitioners address the reasons they believe this Court should grant certiorari, it appears that Petitioners allege that the Eleventh Circuit should not have transferred this action to the Bankruptcy court because the Bankruptcy court may not be able to conduct a jury trial as Petitioners have requested. If this is the argument Petitioners attempt to make, it is bogus. As Petitioners point out, the Second Circuit has found that a bankruptcy court can conduct a jury trial in a core proceeding, such as this action. *See, In Re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Circuit 1990), *cert. granted,* 110 S. Ct. 3269 (1990), *vacated* on jurisdictional grounds, 111 S. Ct. 425 (1990). Thus, Petitioners should have no concern over whether there is a divergence of opinions as to whether a bankruptcy court can conduct a jury trial. The interests of Petitioners in a jury trial are in no way impaired or affected by this asserted divergence. Petitioners are therefore not proper parties to raise this issue.

In any event, the decision by the appellate court to order the transfer of this action to the district court was appropriate. Under the Bankruptcy Code, 11 U.S.C. § 362, actions brought against parties filing bankruptcy petitions will be stayed until the bankruptcy proceeding has been resolved. Any claims for monies from the bankrupt estate should and

must be brought in the bankruptcy proceeding. 28 U.S.C. § 157. In this case, the claims brought by Petitioners involve payments by Eastern into pilot pension plans, alleged contracts between Eastern and Petitioner Tristani, alleged racketeering activity and discrimination by Eastern and several other alleged violations of duties by Eastern towards its pilots. The co-defendants are all related to Eastern in that they are or were upper level management of Eastern or hold an ownership interest in Eastern. The co-defendants may be brought into the bankruptcy proceeding or into the proceedings pending before the New York District Court in order to resolve all issues against all of the defendants simultaneously. 28 U.S.C. § 157.

In *Diamond Mortgage Corp.* v. *Sugar*, 20 BCD 1669 (7th Cir. Dec. 21, 1990), the Seventh Circuit explained that the Bankruptcy Act as amended was intended to give the bankruptcy courts broad jurisdiction over matters arising under Chapter 11 or related to Chapter 11 actions. In *Diamond*, the Seventh Circuit allowed the bankruptcy court to exercise jurisdiction over malpractice claims brought against former legal counsel for the bankrupt partners because the claims were related, if not core to, the pending bankruptcy action.

The claims in this case against the non-bankrupt co-defendants are core proceedings and are directly related to and inextricably intertwined with the claims against Eastern which must be brought in the bankruptcy proceeding. Thus, it is even clearer in this case than it was in *Diamond* that the New York court is the appropriate forum for this action. *See also* G. Treister, et. al., *Fundamentals of Bankruptcy Law* § 6.01(c)(2) (2d ed. 1988) (". . . there should be no legitimate questions about the legislative intent to vest the court with a complete, or pervasive, jurisdiction over all matters that have to do with a bankruptcy case or have any significant bearing upon it.").

Because the action could not be brought against Eastern outside of the bankruptcy proceedings, it is appropriate to consolidate these actions against all of the defendants in one place. In fact, the basic purpose of the Bankruptcy Code is to

mandate the adjudication of all creditor claims in a single forum, namely the bankruptcy court. *In Re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987). This action provides a perfect example of a case that can best be resolved in the bankruptcy proceeding.

If a judgment were entered in favor of the Petitioners against any of the other defendants, there would then be an issue of whether Eastern would have to indemnify the co-defendant. For example, Eastern has a specific contract provision in its agreement with Frank Lorenzo that it will indemnify Lorenzo for any judgments arising against his interests in Eastern. The interests of the parties are so intertwined that Eastern can benefit from the automatic stay provisions only if proceedings against the co-defendants are bought simultaneously in the only forum in which such claims may be raised against Eastern — the bankruptcy proceedings in New York. *See A.H. Robins Co.* v. *Piccinin*, 788 F.2d 994, 1001 (4th Cir.) *cert. denied*, 479 U.S. 876 (1986). If allowed to proceed separately, the bankruptcy proceedings will provide less than the requisite complete relief for Eastern.

In addition, a finding of conspiracy by the co-defendants in a separate action could be extended to apply to Eastern and could collaterally estop Eastern from relitigating the issues after the stay is lifted. *See Lesser* v. *A-Z Associates (In Re Lion Capital Group)*, 44 Bankr. 690, 702-03 (S.D.N.Y. 1984). Thus, allowing a separate action in Georgia against the defendants other than Eastern would only complicate and multiply the number of lawsuits prosecuted by Petitioners. While such complications would provide Petitioners with more than one bite at the apple, which is the entire purpose for Petitioners' insistence on maintaining both the New York and the Georgia actions, it would not be an appropriate course of action for this Court to allow. The best possible resolution to the problems raised by the various claims and actions filed by Petitioners is to consolidate them in the one court which has jurisdiction over all of them and which already has knowledge and an understanding of the issues and circumstances surrounding the claims.

CONCLUSION

Because there was no final decision in this case for review by this Court and because this action was properly transferred by the Eleventh Circuit, the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served directly the requisite number of copies of the foregoing Brief in Opposition on:

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